VIRGINIA LAW REGISTER

R. T. W. DUKE, JR., *Editor.*

BEIRNE STEDMAN AND C. E. SAVAGE, JR., *Associate Editors.*

Issued Monthly at $5 per Annum. Single Numbers, 50 cents.

All Communications should be addressed to the PUBLISHERS

Through the courtesy of The Michie Company we have on our table 121st Virginia Reports.

One Hundred and Twenty-First Virginia: Proceeding under the Prohibition Act.

Seventy-nine cases are reported, of which seventy-seven are civil and two criminal. Forty of the civil cases are affirmed; thirty-one reversed *in toto,* two reversed in part. The appeal is dismissed in one case. A writ of mandamus is awarded in two cases and refused in one.

This is the second volume in which the work of Thomas Johnson Michie as Reporter appears. We did not comment on his work in the first volume of his Reportership—not because we found the slightest thing of which to complain or even to criticize; but it is scarcely just to judge the Reporter by the work of his "prentice hand." But Mr. Michie has shown that his was no "prentice hand" and it would be hard to find work better done than he has done it in these two volumes. His training as a law writer and editor peculiarly fitted him for this work. Its clarity and conciseness of expression is only equalled by the readiness with which he seems to grasp the main points decided in the cases and bring them out so that one sees at a glance what is decided. He is in every way a worthy successor of the able men Virginia has been fortunate enough to have as her State Reporters and our Supreme Court is to be congratulated upon its choice.

The opinion in the two criminal cases reported occupies sixty-five pages, but the greater part of these pages is occupied by the opinion of the Court and the concurring opinion of Judge Sims in *Pine* v. *Commonwealth,* in which the whole question of proceeding in indictments and trials under the Prohibition Law is discussed. Judge Sims' concurring opinion is worthy of careful

perusal and is decidedly instructive. He makes a suggestion which is decidedly novel as far as criminal proceeding in this State is concerned, but one which we think deserves consideration.

In this case Pine was indicted for violation of the Prohibition Law. He was charged with several offenses in a single count, the indictment following the form given in the Prohibition Law, the word "transporting," however, being left out of that indictment. The Court held that in the *absence of statutory regulation,* while any number of misdemeanors of the same nature and punishable in the same manner may be charged in the same indictment, there must be a separate count for each offense and a defendant cannot be convicted of more offenses than there are counts, and it follows that the defendant cannot lawfully be charged with more than one offense in a single count, and that in all cases, civil, as well as criminal, a person haled into court has the right to demand that he be told in plain, intelligible language what is the case of the Commonwealth against him, and this right in so far as it relates to crimes is guaranteed by both the Federal and State constitutions. An indictment following the statutory form as set out in Section 7 of the Prohibition Act, Acts 1916, page 215, undertaking to charge the defendant with all of the first offenses under Sections 3, 4 and 5 of the Act, does not fully inform the defendant "with clearness and certainty" of the "cause and nature of his accusation." Ordinarily the acts done should be charged in order to give the defendant the necessary information. It is the function of an indictment to charge facts and not legal conclusions. The Court further held that in a criminal prosecution the accused has a right to call for a bill of particulars. The Court then went on to state, however, that these rights may be waived if the defendant so chooses, and he will be held to have waived them unless he asserts them. The Court then states that "Except in the single case of an indictment under the Prohibition Law, the law of this State is that there cannot be more offenses than there are counts in the indictment and if the Commonwealth offers evidence of more than one, the proper practice is for the defendant to ask the Court to compel the Commonwealth to elect for which one it will prosecute." In this cas the Court further held that the objection to there being more of-

fenses than one in the same indictment cannot as a rule be raised on demurrer, nor can it be raised on motion in arrest of judgment; the proper method being by motion to quash, though the Commonwealth might be required to elect on which one it would proceed. The Court then states there is no reason on principle why even two felonies of the same nature and punishable in the same manner cannot be charged in different counts of the same indictment and that the Prohibition Act having permitted more than one offense to be charged in a single count, the defendant has not the absolute right to demand of the Attorney for the Commonwealth that he should elect for which of the several offenses he would prosecute. He may desire to prosecute for more than one. It is a matter resting in the sound discretion of the trial Court whether or not an election should be compelled, but where by reason of charging several distinct offenses widely separated by time, place and circumstances the defendant would be seriously embarrassed in making his defense, whether the of fense be a felony or a misdemeanor, an election could be compelled. Judge Sims in his concurring opinion states: "It is elementary law that the accused could not be put to trial for any of such offenses for which he was not indicted, where the statute, as in the instant case, requires the procedure by indictment. The indictment is the safeguard provided by the statute to save the accused from unfounded charges. To illustrate: If it be true that the grand jury in fact found a true bill against the accused for only one of the offenses charged in the indictment, or two, or any number less than the whole number of offenses so charged and yet left in the form of indictment as prepared and sent in to the grand jury by the Commonwealth's attorney, another charge, or other charges, of offenses as to which they did not find a true bill, it is manifest that they went beyond what the true construction of Section 7 of the statute aforesaid authorizes. Necessarily, the true construction of such section is that the grand jury may use the form thereby prescribed in its statement of the several offenses therein named to the extent that a true bill is found by them with respect to the charge or charges of the commission by the accused of such offenses, and no further. Otherwise, as indicated above, the statute would be con-

strued to authorize the trial of the accused upon charges upon which there has been no indictment of him by a grand jury.

"This indeed would be a hardship—is in truth the chief hardship of which the accused complains in the instant case—and, if it appeared of record to exist in such case, the judgment should be unhesitatingly reversed. But the indictment in the instant case does not merely follow the form of the indictment provided for in Section 7 of the Act; it does not contain the charges of all the offenses therein named. This is some indication that the grand jury, in the instant case, found a true bill as to all of the offenses in fact charged in the indictment. However, after indictment found and the grand jury is discharged, their proceedings in this particular cannot be inquired into. The trial court, indeed, before the discharge of the grand jury, has the whole matter under its control. It may, by polling the grand jury and inquiry as to what charges stated in the indictment they have found a true bill, ascertain that fact and eliminate any chance of charges being left in the form of the indictment as drawn and retained therein as charges as to which a true bill is found, when in fact no true bill is found with respect thereto. In view of the danger of such error occurring, it would be the better practice of the trial court, upon its own motion, to adopt this procedure in dealing with indictments under said Section 7. If it does not, the accused, if present when the indictment is presented to the trial court by the grand jury, may by motion have the trial court pursue this course of procedure. If the accused is not present, or, if present, does not make such motion, and the grand jury presents the indictment in the form in which it is in the instant case as a true bill, and is discharged, or in any case, in whatever form the grand jury, on being discharged, leaves the indictment as its presentation thereof to the trial court, such indictment, as in fact presented to such court, must be taken by the trial court and by this court to be the indictment found by a grand jury. The subject cannot be further inquired into after the grand jury has been discharged.

"Manifestly the question as to whether there is a lack of a true bill as to any of the charges stated in the indictment cannot be raised by the motion to have the Commonwealth elect on which charge, or charges, it will ask for conviction. Such question

must and can be raised only in the preliminary proceedings aforesaid before the trial court, before the discharge of the grand jury."

The suggestion in Judge Sims' opinion, which we think is a novel one, is as to the conduct of the trial court and the discharge of the grand jury in regard to indictments. We have never known it put into practice but we believe it is a most admirable suggestion and would save a vast amount of trouble in the matter of demurrers, motions to quash, etc. As a general rule when the grand jury bring in their indictments the Clerk simply reads "a true bill" or "not a true bill" and the charges contained in the indictments found are very seldom known to anybody but the attorney for the Commonwealth and the grand jury. If each indictment could be examined by the Court as soon as found and whilst the grand jury is in session the danger of error would be almost entirely eliminated and we believe it would be an exceedingly wise thing to do, not only in proceedings under Section 7 of the Prohibition Act but in all cases.

Service of Process in Divorce Suits.

A very novel case came up in one of the circuit courts of this Commonwealth a month ago. It was left undecided, as the lawyer who represented the plaintiff in the case wisely determined to take no risks and had an alias process issued and served. The case was this: Sallie Doe sued her husband, John Doe, for divorce. The sheriff returned process executed as follows: "Not finding John Doe at his usual place of abode I served the within subpoena in chancery by delivering a true copy thereof and giving information of its purport to his wife found at the said John Doe's usual place of abode in my bailiwick. Samuel Server, Sheriff ———— County, Virginia."

John appeared specially at the return day of the writ and moved to quash the return, but Sallie's counsel at once took water and did not resist the motion, indeed acquiesced in it and then issued an alias; but was not this a good service and return? Certainly it complied with every condition of the statute. It complied with Section 2260, being served by an officer authorized to serve it; it complied with Section 3207 which provides, "A no-

tice no particular mode of serving which is prescribed may be served by delivering a copy thereof in writing to the party in person or if he be not found at his usual place of abode by delivering such copy and giving information of its purport to his wife, etc., etc." The sheriff, who was bitterly reproached for his return, replied that he acted in absolute accordance with the letter of the law. He did not find the man at his home, he did not know where he was. Nobody was there but the wife and it was not his business to know whether she was the plaintiff or otherwise in the suit. It was impossible for him to make a return that he did not find any person at John's usual place of abode, for the wife was there. It was his duty to serve the process and he served it accordingly. "Cuss the Legislature—not me," he replied, and one more solemn objurgation of that much abused body ascended to heaven.

Now, why was not this a good return? The statute makes no exception. It provides that an officer must serve the writ; the officer did this. It says the process under the circumstances named can be served upon the wife; the officer did this. The statute does not say that where the wife is suing the husband process against him cannot be served on her. When he is not found at his usual place of abode the service on the wife as set out is good; yet it would be a monstrous thing to allow a plaintiff to be served with a writ against a defendant; for thus the door might be opened to all sorts of fraud and Sallie might have sued John, had a notice for alimony served upon herself as his wife, and John have been divorced with large counsel fees and alimony against him and a final decree entered before he ever heard of the suit. We think the young barrister who permitted this return to be quashed and issued an alias with strict instructions to the sheriff to "find his man" was wise. But suppose the sheriff cannot find the man and the wife chooses to remain at the man's usual place of abode? How can service ever be obtained? Of course the wise lawyer would advise the wife to stay away from the house a day or so and send the sheriff to the house during her absence, when he could serve it upon some other member of the family, or in the absence of all of them, post the writ at the front door; but in all events the case is a novel one, not without

serious difficulty and the section ought to be amended so as to provide that when a wife sues for a divorce service can be served on the husband in case of his absence from his usual place of abode by either delivering it to some member of his family, except the wife, or by posting same on his front door. But it might be very aptly asked, "Que diable allait-elle faire dans cette galère?" In other words, what was the wife thinking of when she remained at her husband's house after she had brought suit against him for a divorce? But that is another story, as Kipling says.

Killing by an Officer in Attempting to Make an Arrest, or Prevent Escape of a Misdemeanant.

Is not the wounding or killing by an officer in the attempt to arrest for a misdemeanor punishable as a felony? There seems to be an impression amongst the police officers and constables, and probably amongst others, that the use of fire arms is absolutely justifiable in making *any* arrest and here lately there have been numerous accounts of officers in this State shooting at parties in automobiles supposed to be evading the prohibition laws of the State. Of course we understand that amongst certain people the violation of the Prohibition Law is an offense which they consider ought to be punishable with death, yet the attention of officers ought to be called to the fact that a man violating the Prohibition Law is ordinarily a misdemeanant and that any officer who kills a man who is fleeing from him, even though he may be suspected of violating the Prohibition Law, is guilty of murder and in case of wounding, guilty of assault with intent to kill. While an officer may have a right under certain circumstances to kill a felon in order to prevent his escape, or in making an arrest, there is absolutely no question that the officer has no right to wound or shoot a man, for whom he even has a warrant, for a misdemeanor unless the man uses violence in resisting arrest; but the mere fact that he flees to avoid arrest does not give the officer any right whatever to shoot at him, much less to wound or kill him. Neither a private citizen nor an officer in attempting to arrest one guilty of a misdemeanor, is justified in

killing the alleged offender merely to effect the arrest, whether the offender be fleeing to avoid arrest or to escape from custody. Michie on Homicide, Sec. 105, page 315; Reed *v.* Commonwealth, 30 Ky. L. Rep. 1212, 100 S. W. 856; Commonwealth *v.* Rhoades, 23 Pa. Super. Ct. 412; State *v.* Whittle, 59 S. C. 297, 37 S. E. 923.

Of course if a misdemeanant offers armed resistance to an officer having a warrant for his arrest, to kill the misdemeanant under these circumstances is justifiable homicide; but the killing of a misdemeanant to prevent his escape is not justifiable, although there are no other means whatever of arresting him. Thomas *v.* Kincaid, 59 Ark. 502, 29 Am. St. Reports 68; Handley *v.* The State, 96 Ala. 48, in which the Court—McClelland, Justice, delivering the opinion—says as follows: "An officer charged with the duty of arresting a misdemeanant has no more authority to shoot him down to prevent an escape than he would have a right to kill any indifferent person who was casually walking or running away from the place where the officer happened to be." In this case the defendant was convicted of murder in the first degree and the judgment affirmed. The defendant had gone at the request of the deputy sheriff to assist in arresting the deceased upon a charge of beating his wife. The deceased when he saw the defendant came towards him, saying, "This is one of the damned rascals who wants to arrest me." The defendant told him to stop and when he continued to advance and was proceeding to draw a knife, shot and killed him. An instruction was asked and refused, to the following effect: "If the defendant was requested or told by the deputy sheriff to aid or assist or help in arresting the deceased, and if he in pursuance of said request attempted to arrest the deceased, who thereupon fled, and the defendant shot him to prevent his escape, then you may look to this fact under the law to reduce the offense to manslaughter; and unless the defendant shot in pursuance of a plan designed to take the life of the deceased he cannot be convicted of murder."

In the case of Smith *v.* The State, 59 Ark. 132; Am. State Reports, page 43, the law was settled as follows:

"A peace officer may arrest one committing a misdemeanor in his presence without a warrant and if necessary orally summon as many persons as he deems necessary to aid him in making the

arrest; in making the arrest or preventing an escape after an arrest, the officer or person assisting him in obedience to a summons, when resisted by the offender is not bound to retreat but may use such physical force as is apparently necessary on the one hand to affect the arrest by overcoming the resistance he encounters, or on the other hand to subdue the efforts of the prisoner to escape, but he cannot in either case take the life of the accused or even inflict upon him a great bodily harm except to save his own life or to prevent a like harm to himself."

In our own State our Supreme Court has laid down the law that a constable in cases of misdemeanor cannot any more than a private person justify the arrest of the offender without a warrant when the offense was not committed in his presence. Muscoe's case, 86 Va. 446. And in the same case the court laid down the law that if an officer attempts to illegally arrest a man and the party about to be arrested kills the officer, the killing is only manslaughter unless the circumstances show malice.

So we think it would be very advisable for officers attempting to arrest in any misdemeanor case, particularly in suspected violation of the Prohibition Law, to have a warrant, but whether they have a warrant or not, to be exceedingly careful how they use fire arms upon any party attempting to escape them; for our own belief is that if they were to kill a person fleeing from them whom they had attempted to arrest without a warrant, or even if they had a warrant, the offense would be murder.

The End of the War.

Ever sinee that fateful day in August, 1914, when the former German Kaiser unleashed his Hunnish legions upon an unsuspecting world there have arisen prophets without number who have essayed to say when the World War would come to an end. These prophets, "military critics" and "newspaper generals," have proclaimed from time to time that within a certain period the dove of peace would have flown once more over a war-stricken world, bearing the olive branch in her beak. These foretellers of events were not satisfied with present day prophecies, but delved among those of old and brought to light many ancient and legendary tales "to confound a world worse con-

founded." According to one interpretation the end would come on a certain day when the cock of France would spur to the heart the German eagle, and the monstrous bird of Austria would lose both of its heads. They went farther and called Holy Writ to bear witness to their wordy emanations, the Book of Revelation being the chief fountain of knowledge from which they gained the power to pierce the curtain of the future. Again, calling the science of mathematics to their aid, they added the dates of the births of the rulers of the warring countries and various other dates, and by a process of computation not always logical found the time desired. Time and time again have these prophecies been proven false. When the war first began, its duration was generally estimated at from two to three months and very few thought that it would last longer than the first Christmas. The statement of the lamented Lord Kitchener, who changed England's fighting force from a "contemptible little army" into a great war machine, that the war would last for three years was disbelieved by many. As time went on the various opinions as to the duration of the war were revised, and it is reported that the great Field Marshal shortly before his death said: "The first seven years of the war will be the worst."

The question "When will the war end?" is no longer in the domain of prophecy provided the armistice recently signed has the effect desired and hoped for, but it is still of legal importance as its answer may figure in much future litigation. In the United States and England many statutes have been passed to continue in force for the duration of the war, and many regulations made pursuant to these statutes will automatically cease to operate when the war ends. So at the end of the war rights of great magnitude may depend upon the matter of a few days.

War may terminate by a treaty of peace, which is the usual way, or by a cessation of hostilities. By this latter method the conflict between Russia and Germany was brought to a close, although its ending is complicated by a so-called treaty of peace. Probably a decision by a Bolsheviki court as to when the war really ended would make very interesting reading.

The hostilities between Germany and the Allies have ceased according to the terms of the armistice laid down by the Allied Council at Versailles and transmitted by Gen. Foch. It is con-

fidently expected and hoped that the carrying out of these terms will as a matter of fact really end the Great War. But in a legal sense a truce or suspension of fighting does not terminate the war, merely suspending its operations. At the expiration of the truce, hostilities may recommence without any fresh declaration of war. So in the case of the Spanish-American War it was held that a state of war did not in law cease until the ratification in April, 1899, of the treaty of peace, though actual hostilities were suspended by the protocol of August 12, 1898. (Hijo *v.* United States, 194 U. S. 315, 323, 48 L. Ed. 994.) In accordance with this holding is the report of a committee appointed by the Attorney General of Great Britain to consider the matter in its legal bearings. This committee reported that: "The war cannot be said to be at an end until peace is finally and irrevocably obtained, and that point of time cannot be earlier than the date when the treaty of peace is finally binding on the respective belligerent parties; and that is the date when the ratifications are exchanged." However, in a case set out in Scott's Cases on International Law where a ship had been captured a month after the signing of a treaty of peace but a week before its ratification, the decree of condemnation of the inferior court was reversed.

It is the province of the political, and not the judicial, department of the federal government to determine when the war is over. (Conley *v.* Supervisors, 2 W. Va. 416.) Thus the termination of the "late unpleasantness of the early sixties" between the States was held to be determinable by some public act of the political department. (The Protector, 79 U. S. 700, 20 L. Ed. 463.) In the case of that conflict presidential proclamations were held in the two decisions last cited to have fixed the date of its termination. The war did not close at the same time in all the states. There were two proclamations declaring that the war had closed; one issued on the 2d of April, 1866 (14 Stat. at Large, 811) embracing the States of Virginia, North Carolina, South Carolina, Georgia, Florida, Mississippi, Tennessee, Alabama, Louisiana, and Arkansas, and the other issued on the 20th of August, 1866 (14 Stat. at Large, 814) embracing the State of Texas. According to this last proclamation the war was at an end and peace prevailed throughout the United States of America on the 20th day

B. S.